NO. 20032

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES E. FALK and
MAX G. WENDELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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I

JURISDICTIONAL STATEMENT

On March 4, 1964, a nine-count indictment was returned against appellants and one Robert W. Stanley by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2-16]. 1/

The indictment charged perjury, subornation of perjury and obstruction of justice in connection with the prior trial of appellant Falk for armed robbery of a savings and loan association, at which he was acquitted by a jury.

Falk was convicted of one count of perjury (Count Two), and

1/ C. T. refers to Clerk's Transcript on Appeal.

one count of obstruction of justice (Count Nine). Wendell was convicted of one count of perjury (Count Six). Attorney Robert W. Stanley was acquitted of all charges [C. T. 47].

Appellants were both sentenced to the custody of the Attorney General for five years with the provision that they be eligible for parole at any time [C. T. 48].

Appellants filed timely notices of appeal, and were granted leave to appeal in forma pauperis [C. T. 57, 61].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 1503, 1621 and 3231. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1503 provides:

> "INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY - Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or

other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injuries any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injuries any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injuries any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1621 provides:

"PERJURY GENERALLY - Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that

any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

Appellants were indicted along with an attorney, Robert W. Stanley, on March 4, 1964, on charges of perjury, subornation of perjury and obstruction of justice, arising out of the former trial of appellant Falk for bank robbery [C. T. 2]. Stanley was Falk's attorney at the bank robbery trial in which Falk was found not guilty by a jury.

Appellants were arraigned on March 16, 1964, and entered pleas of not guilty on May 4, 1964 [C. T. 17, 24].

The trial of appellants and Stanley commenced on July 8, 1964, before the Honorable C. Nils Tavares, United States District Judge, sitting without a jury, following the filing of written waiver of a trial by jury [C. T. 38].

On July 21, 1964, the Court dismissed Counts One, Three, Four and Six against Falk on the ground of Res Judicata, found him guilty as to Counts Two and Nine, and not guilty as to Counts

Five, Seven and Eight. On the same day, the Court found Wendell guilty as to Count Six, not guilty as to Count Seven, and found Stanley not guilty on all counts in which he was charged [C. T. 47].

Count Two of the indictment, of which Falk was convicted, charged that in the bank robbery trial the following testimony of Falk was knowingly false:

"Q. Mr. Falk, when you escaped from the Chino institution, you were not alone, were you?

"A. Oh, yes, I escaped alone.

"Q. You were joined shortly thereafter in that case by a fellow escapee Christopher Zaccaria, were you not?

"A. I met the fellow in Los Angeles.

"Q. He was an escapee from Chino?

"A. He was but he did not escape with me." [C. T. 6].

Count Six of the indictment charged Wendell with knowingly giving the following false testimony at the prior trial:

"Q. Now, at some time during the month of August [1963] did Gene Patterson bring an automobile over to your house?

"A. Yes, sir, it was '50 Plymouth, two-door sedan; a blue one.

* * *

"Q. Then did he ever pick the car up?

"A. Yes, sir, he come over one morning on -- around 10:00, 10:30 and said he wanted to use the car for some -- I don't know. The way he told me it was some bank job. I told him, I said, 'Don't plan on me going with you. I don't want to.' He said, 'No, I got a friend here with me. We will take the car and take it away.'

"Q. He said that to you where, in the house?

"A. I was standing in the doorway of my house.

"Q. Did you see the person who was with him?

"A. Yes, sir.

* * *

"Q. Were you at that time acquainted with a Chet Helpman?

"A. Chet was the one that was with him that day. * * *

"Q. Where was he? Was he in the car?

"A. He was in Gene's car.

"Q. And did they take the car?

"A. Gene drove the car away, yes sir.

* * *

"Q. Mr. Patterson drove which car away?

"A. The '50 Plymouth.

"Q. What car did they come in?

"A. They came in, oh, about a '55 Chrysler, blue and white Chrysler . . . ."

Count Nine, the other count of which Falk was convicted charged Falk and Stanley with endeavoring to obstruct and impede the administration of justice by endeavoring to influence the testimony of two prospective witnesses, Clara Belle Miller and Ronald Lee Miller, in the prior bank robbery trial.

Falk was sentenced to five years imprisonment under Title 18, United States Code, Section 4208(a), on each of Counts Two and Nine, to run concurrently. Wendell was sentenced to imprisonment for a term of five years under Title 18, United States Code, Section 4208(a), on Count Six.

IV

STATEMENT OF FACTS

A. The Trial of Appellant Falk For Armed Bank Robbery

1. Government's Proof

On August 20, 1966, an armed robbery was committed by two men at the Avalon Savings and Loan Association in Wilmington, California. Gene L. Patterson and Appellant Falk were indicted for the robbery.

Patterson pleaded guilty and testified as a Government

witness at the trial of Falk [T. R. 183]. 2/

Patterson testified that he met Falk on August 20, 1963, because Falk wanted to borrow some guns for a robbery. Patterson and Falk decided to go out together and look for something to rob. They then went out and drove around, and Falk showed Patterson the Avalon Savings and Loan Association which was a place he, Falk, had cased before going to jail [T. R. 187-189].

They then went and picked up an old Plymouth automobile. Thereafter, Falk suggested that he put makeup on Patterson to simulate a scar, because the person with whom Falk had recently escaped from State Prison had such a scar. Patterson testified they then went and robbed the Association [T. R. 190-192].

Six employees of the Association identified Falk as one of the two men who robbed the bank, and one of them testified that he had leaned on the counter [T. R. 22, 52, 53, 83, 126, 144 and 159]. Falk's palm print was found at that spot [T. R. 280, 285, 291]. The janitorial service testified that the counter was cleaned every night [T. R. 408].

2. Falk's Defense

Falk testified that he did not commit the robbery, although he had gone to the Association the previous day with Patterson and others to "case" it [T. R. 333-334]. However, he decided not

2/ T. R. refers to transcript of the robbery trial which was an exhibit in this case.

to rob it [T. R. 348]. He further testified that he did not escape from State Prison with someone else but rather alone [T. R. 348].

Appellant Wendell then testified that Patterson came by his house to pick up a car in August with Chet Helpman, and told Wendell that he, Patterson, and Helpman were going to rob a bank [T. R. 394-400].

Chet Helpman was called to the stand by the defense and claimed the privilege against self-incrimination on all questions put by the defense in connection with the robbery, although he was later produced as a Government witness and denied his participation [T. R. 305-310, 429].

B. Facts of the Instant Case

1. Count Two - Falk's Escape From Prison

The records of the Department of Correction at Chino, California, showed that at 9:10 P. M., on August 13, 1963. Appellant Falk and Christopher Zaccaria, both inmates at the institution, were present for the count [R. T. 202]. 3/ However, at the 11:00 P. M. count, both were missing [R. T. 101].

After his apprehension, Falk told a Chino Official and Police Officer that he had escaped with another person whose name was

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3/ R. T. refers to Reporter's Transcript.

Zaccaria by going out a bathroom window [R. T. 205]. In addition, Falk admitted that he escaped with another person to Patterson and F. B. I. agents [R. T. 137, 551 and 577].

2. Count Nine - The Efforts By Falk to Influence the Millers to Give Him An Alibi

Within a few days after the robbery, Mr. and Mrs. Miller were introduced to Falk by Patterson [R. T. 315]. On one occasion, the Millers attended the robbery trial and spoke to Falk during a recess. Falk indicated that he wanted to talk to them and a meeting was arranged at the jail that night [R. T. 316].

At this meeting, Falk asked the Millers to testify at the robbery trial that he, Falk, was at their house at the time of the robbery [R. T. 321-322]. Falk had not been at their house at that time [R. T. 355].

Before the robbery trial, Mr. Miller had talked to an F. B. I. agent, and told the agent about persons who had stayed at their house during the summer of 1963, including Falk and Patterson [R. T. 354].

Falk testified that at that meeting he did ask them to be witnesses but to testify about a loan of $50 and some luggage by Mr. Miller to Falk after the robbery [R. T. 910].

There was also evidence that the following night Mrs. Falk, appellant Falk's wife, came by the Miller's house with a subpoena for Mr. Miller [R. T. 346-347].

3. Count Six - Patterson's Visit to Wendell's House With Helpman to Pick Up a Car.

Appellant Wendell testified for the defense at the robbery trial that in August, 1963, Patterson came by his house to pick up an old Plymouth, the battery of which was being charged, with Chet Helpman. He also testified that Patterson said he and Helpman were going out to rob a bank, and then that Patterson drove off in the Plymouth [T. R. 394-400].

Helpman testified at the instant trial that he never went with Patterson to Wendell's house to pick up a car and left in separate cars [R. T. 257]. He further testified that when Falk asked him to claim the Fifth Amendment, Falk stated that he had asked Wendell to testify that Helpman had been to Wendell's house on the robbery, but that Wendell wouldn't so testify without the consent of Helpman [R. T. 229].

Patterson testified that on the day before the robbery, he left an old 1948 Plymouth at Wendell's house and put a battery charge on it. The day of the robbery, he and Falk went over to Wendell's and picked up the Plymouth and that Wendell was there when Falk drove the Plymouth away, and he, Patterson, drove his Chrysler away [R. T. 133-135]. He further testified that Falk and Wendell spoke to each other [R. T. 136].

Edward Bryan Ballard, who was in County Jail with Wendell during the robbery trial, testified that on February 13, 1964, Wendell told him he was going to testify for Falk in Federal Court

to the effect that "Chet", rather than Falk, was in the car with Patterson when they came over to his house. Wendell also told Ballard that Chet was not in the car [R. T. 392]. Wendell said it was already fixed up that Chet wouldn't get into trouble, and that he, Wendell, was going to perjure himself [R. T. 393].

The next day Wendell told Ballard that he had been to court and testified as he had indicated he would [R. T. 394].

V

SPECIFICATION OF ERRORS

A. Appellant Falk Has Alleged the Following Errors:

1. The trial court erred in failing to grant the defendant's motion for judgment of acquittal on the perjury count. The prosecution failed to introduce the quantum of evidence necessary to convict of perjury and further failed to prove that the allegedly perjured statement was "material".

2. The trial court erred in failing to grant the defendant's motion for judgment of acquittal on the obstruction of justice count. The defendant was indicted for endeavoring to influence, intimidate and impede prospective witnesses. The prosecution failed, however, to establish that at the time the act allegedly occurred the individuals involved were witnesses, or prospective witnesses, within the purview of 18 U. S. C. §1503.

3. The trial court erred in introducing admissions of

the defendant that he had escaped from prison together with another inmate. These admissions were made to federal law enforcement officers during interrogation. The evidence shows that at some time the defendant had requested counsel and his requests were ignored. Since it does not appear from the record whether these statements were made before or after the defendant requested counsel, the case should be remanded for testimony on this point. The admissions were introduced at pages 548-52 and 575-77 of the Reporter's Transcript. The testimony with regard to whether the defendant was afforded counsel appears at pages 570-71, 927, 936-37 and 985-87.

B. Appellant Wendell Has Alleged the Following Errors:

1. The record does not contain sufficient evidence to support Wendell's conviction of perjury.

2. Wendell's prosecution for perjury was barred by the doctrine of collateral estoppel.

VI

ARGUMENT

A. THE EVIDENCE ON COUNT TWO WAS SUFFICIENT TO AUTHORIZE THE CONVICTION OF APPELLANT FALK FOR PERJURY.

Appellant Falk contends that there was insufficient evidence produced at trial to convict him of perjury. The evidence in this respect showed that prior to the robbery trial Falk stated to numerous persons that he had escaped from prison with another person named Zaccaria. These statements were corroborated by the fact that both appellant and Zaccaria were discovered missing at the same time and that both were in the prison about an hour and one-half before that.

Appellant Falk relies on Umbriaco v. United States, 258 F. 2d 625 (9th Cir. 1958) to support his contention that such evidence is not sufficient to sustain a perjury conviction. In Umbriaco, supra, the defendant had previously testified that she was not a prostitute, but that she had received money for relations with one man. At the perjury trial one man only, Campbell, testified that on several occasions he had paid the defendant for acts of sexual intercourse. The Court pointed out that Campbell's testimony didn't even contradict the defendant's testimony, and reversed stating that a corroborated unsworn admission is not enough. Judge Pope, in his concurring opinion, points out that no case so holds. He points out that the girl's admission did not contradict the

presumably false testimony for even though she denied being a prostitute, she testified that she engaged in acts of prostitution. There the statement simply was not false.

In the case of United States v. Goldberg, 290 F. 2d 729 (2nd Cir. 1961), cert. den. 368 U. S. 899, the Court stated that a corroborated admission is sufficient, although it did not find it necessary to so hold as the Court found that there was other evidence. The Court did go into the history of the sufficiency rule in perjury cases and later discussed the decision upon which appellant Falk here relies.

> "The historical origins of the rule that a conviction for perjury may not be had on the basis merely of 'oath against oath' (citations) are illuminatingly described in 7 Wigmore, Evidence (3d ed. 1940), pp. 273-275. In our time the rule rests on society's obligation to protect a witness 'from oppression, or annoyance, by charges of having borne testimony, ' from those 'against whom his evidence tells,' (citation). Logically that policy would be satisfied by requiring added proof only when the 'oath' relied on by the prosecutor is that of a person in an adversary relation to the defendant. However, the rule clearly goes further; it is most accurately stated in the negative fashion that Wigmore employs, one witness, without corroborating circumstances, does not suffice, p. 273. It differs from the special rule in treason trials in that two witnesses are

not required; indeed, a conviction may sometimes be had when there are none at all, (citations), save as to the identity of physical objects having circumstantial relevancy.

"The special status of evidence of an admission in prosecutions for perjury rests upon the nature of the offense. The relevancy of a defendant's prior or subsequent statement of fact contrary to his testimonial assertion is that, in the absence of evidence of a change in defendant's knowledge, the jury may permissibly infer that one or the other utterance did not reflect defendant's belief at the time it was made. The difficulty is that, without more, there is no more reason for thinking the admission to have been true and the testimony false than the reverse. This reason underlies the holdings that a perjury conviction may not be had solely on the basis of oral admissions contrary to the allegedly perjurious statement, even if several witnesses testify to the admissions. (citations).

"With respect to Count II, appellant relies on the statement in Umbriaco v. United States, 9 Cir. 1958, 258 F.2d 625, 628 that 'a corroborated, oral, unsworn admission of falsity: is never sufficient to support a conviction for perjury, no matter how strong the circumstantial corroboration may be.' Although we have no difficulty with the result there reached,

for reasons pointed out in the concurring opinion of Judge Pope, we think the rule is not so rigid as the majority asserts. Any such view seems quite inconsistent with the Supreme Court's decision in United States v. Wood, supra, that there may be conviction for perjury without the testimony of any 'witness' at all when the circumstantial evidence is sufficiently probative." 290 F.2d 729, 733-735.

B. THE TESTIMONY OF FALK WAS MATERIAL AS TENDING TO IMPEACH THE TESTIMONY OF PATTERSON.

Patterson on direct testimony at the robbery trial stated that he put makeup on his face to give the appearance of a scar at the suggestion of Falk, because Falk had escaped from prison with a man who had such a scar, and that if Falk were identified, the authorities would think that it was Falk's co-escapee rather than Patterson who was involved.

Had Falk testified that he had escaped with such a man, this would have strongly corroborated Patterson, whom the jury had to disbelieve in order to acquit Falk of the robbery. His denial of the escape with Zaccaria contradicted and therefore impeached the testimony of Patterson.

That such testimony is material is clearly established by United States v. Letchor, 316 F.2d 481 (7th Cir. 1963), cert. den.

375 U.S. 824, wherein the Court stated at 316 F.2d 484:

> "Impeachment of a witness goes to his credibility and questions on cross-examination for this purpose may be material in the sense required for a perjury conviction. (citation)."

C. APPELLANT FALK WAS PROPERLY CHARGED WITH AND CONVICTED OF OBSTRUCTION OF JUSTICE.

Count nine of the indictment charged Falk with endeavoring to obstruct and impede the administration of justice by endeavoring to influence the testimony of two prospective witnesses. The charge is not influencing two prospective witnesses, as Falk contends, but rather endeavoring to obstruct and impede the administration of justice in a certain manner, namely, influencing the testimony of the Millers. As such, Falk was fully and fairly informed of what he had to meet at trial.

This case is directly governed by Roberts v. United States, 239 F.2d 467 (9th Cir. 1956). There a party to a civil contract action asked someone to testify that she had seen a written contract. Roberts urged the government failed to prove the crime charged and the court gave its answer:

> "It is also argued that the third count of the indictment is faulty in that it charged appellant with acts constituting obstruction of justice, whereas the evidence discloses no more than an attempt to suborn

perjury; and therefore the rule that a conviction of an attempt to suborn perjury requires either two witnesses or one witness and corroborating circumstances is applicable. Also, that Mrs. Dutcher was not a 'witness' within the meaning of 18 U.S.C.A. § 1503, as she had not been subpoenaed or subjected to any other process of the District Court at the time of the alleged illegal influence.

"Any corrupt endeavor to influence any party or witness, whether successful or not, constitutes obstruction of justice prohibited by said section. See Catrino v. United States, 9 Cir., 1949, 176 F.2d 884. The obstruction of justice statute is broad enough to cover the attempted corruption of a prospective witness in a civil action in a Federal District Court. Here the evidence discloses that appellant corruptly endeavored to influence, obstruct and impede the due administration of justice in his attempt to induce Mrs. Dutcher to give false testimony at the trial. Wilder v. United States, 4 Cir., 1906, 143 F. 433."

The record in this case reflects that Mr. Miller had been interviewed before the robbery trial; that Falk was seeking to use them as an alibi; that their true testimony could have disproved the alibi; and that on February 13, 1964, Mr. Stanley prepared a subpoena for Ronald Miller [R. T. 706, Exhibit H]. As such, it is

clear that Falk was treating them as prospective witnesses, just as the defendant did in the Robert's case, supra.

There is nothing in the statutes or the cases, other than Walker v. United States, 93 F. 2d 792 (8th Cir. 1938), cited by Falk, that indicates that the statute is not designed to cover attempts to secure false testimony from the defendant's witnesses. The Walker case, supra, gives too narrow a construction to the statute and is contrary to the law in this circuit as stated in Roberts, supra.

D. NO ERROR WAS COMMITTED IN ADMITTING THE STATEMENTS OF FALK.

Appellant Falk, for the first time on appeal, challenges the propriety of admitting certain admission to FBI agents. No objection was made at trial which would have given the court an opportunity to inquire into the matter. The court should treat Falk's contention here as it treated a similar one in Robbins v. United States, 345 F. 2d 930 (9th Cir. 1965), wherein the appellant contended for the first time an appeal that he was denied a request for counsel before the Commissioner. There the Court did not consider the question to be properly before the Court.

Even were the Court to consider the question, the evidence in the record from Falk himself indicates that he did not ask to see an attorney until about a week after his arrest [R. T. 936]. The admissions concerning his escape was made on the same day as he was arrested and the following day. The evidence also discloses

that when the agents became aware of his desire to contact an attorney, they went to see him on September 25, 1963 and assisted him in contacting one [R. T. 979]. Falk further admitted to the agents on September 25 that he had been allowed to make calls [R. T. 980].

E. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE CONVICTION OF APPELLANT WENDELL.

The evidence with respect to Count six of the indictment shows that according to Patterson, prior to the robbery, he left an old Plymouth at Wendell's house for a battery charge and went to pick it up with Falk on the day of the robbery [R. T. 133-135].

Helpman testified that he never went with Patterson to Wendell's house to pick up a car and drove away in separate cars [R. T. 257]. He further testified that when Falk asked him to take the Fifth Amendment, Falk told him that Wendell would only testify that it was Helpman at his house with Patterson, if Helpman consented.

Ballard testified that during the trial, Wendell told him that he was going to perjure himself by testifying that it was Chet rather than Falk who came to his house, and afterwards that he had so testified [R. T. 392-394].

The only question raised by Wendell on this question is whether the witnesses were talking about the same day as was Wendell when he testified at the robbery trial.

Wendell's testimony was that in August, 1963, Patterson and Helpman came to his house in Patterson's Chrysler to pick up a Plymouth which Patterson had left for a battery charge; that he saw Helpman in Patterson's Chrysler, and that Patterson drove the old Plymouth away.

Wendell's contention here is that Helpman's testimony does not contradict Wendell's because he said that there was never an occasion when he went to Wendell's house with Patterson to pick up a car and drove away in separate cars.

The testimony of Wendell at the robbery trial shows that Patterson and Helpman must have driven away in separate cars. According to his testimony there, Patterson and Helpman came in one car, a Chrysler, to pick up another, a Plymouth, and that Patterson drove away in the Plymouth. Therefore, it would appear that Helpman would have had to drive away in another car than did Patterson. Moreover, it was Wendell's intention to testify about the same incident and just change the parties. This is corroborated by Falk's statement to Helpman about Wendell's testimony and Wendell's statement to Ballard that he was going to say it was Chet Helpman instead of Falk who came with Patterson. Wendell, in his own testimony, at the instant trial stated that on the occasion about which he was testifying in the robbery trial, the other man drove Patterson's Chrysler away [R. T. 880]. He also testified that his testimony was predicated upon the fact that it wasn't Falk who came to his house but rather Chet Helpman [R. T. 861]. Based upon Wendell's own testimony, there was a direct contradiction between

his testimony at the robbery trial and the testimony of Helpman at the perjury trial. This was amply corroborated by the admissions to Ballard and the testimony of Patterson that it was Falk with whom he, Patterson, went to pick up the old Plymouth.

Goldberg v. United States, supra.

F. APPELLANT WENDELL IS NOT ENTITLED TO THE DEFENSE OF COLLATERAL ESTOPPEL.

Wendell's second point on appeal seeks to extend the res judicata principal to witnesses. He relies for this proposition on the California civil case of Bernhard v. Bank of America, 19 Cal. 2d 807 (1942). While no case has been found which discusses this question in a perjury case, such as is here before the court, it should be noted that the California courts, upon which appellant Wendell relies does not even extend the doctrine of collateral estoppel in perjury cases to protect a defendant who commits perjury.

People v. Housman, 44 Cal. App. 2d 619, 112 P. 2d 944 (1941).

While appellant is quite right that perjury prosecutions of untruthful witnesses consumes the Court's time, it seems a small burden when compared to the necessity that a Court's decision be based upon truthful testimony.

CONCLUSION

For the reasons herein stated the judgment should be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur I. Berman

ARTHUR I. BERMAN

See also Vols. 3351 3357

No. 20,034

In The

United States Court of Appeals

For the Ninth Circuit

Baize International, Inc.,

Appellant,

v.

William C. McGinnis, et al,

Respondents.

APPELLANT'S PETITION FOR REHEARING

Barrow, Bland, Rehmet &
Singleton

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Baize International, Inc.,

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APPELLANT'S PETITION FOR REHEARING

On March 11, 1966, this Honorable Court filed its Opinion in this cause affirming the judgment of the trial court. This Petition for Rehearing is being filed pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit.

As grounds for the Petition for Rehearing, Appellant would show the Court that the case was tried in the Court below on an erroneous theory of the applicable law. The question of the effect of local law and whether it was complied with was entirely omitted from the trial and this is the point which is controlling in this case. The record is silent as to what local law governs the perfection of the assignment, within the meaning of Section 60 of the Bankruptcy Act, and there are no facts disclosing whether or not such local law was complied with.

In the Opinion filed by this Court, in affirming the judgment of the Court below, the Court approved the Appellant's reasoning that the Government Assignment Statute, 41 U.S.C.A. Section 15, did not govern the rights of the parties to an assignment of a claim under a government contract or those rights of third party creditors. The Court agreed with Appellant that the statute only operated to protect the United States. Consequently, it is local law, and not the Federal Statute, which controls whether or not there has been a "perfection" of the assignment, and when, within the meaning of Section 60 of the Bankruptcy Act. The entire trial in the Court below on the issue of whether an act of bankruptcy had occurred and when it became perfected was based on the effect of the Federal Statute, 41 U.S.C.A. 15, and when notice was given to the contracting officer, and the trial in no way touched on the facts of the assignment, what local law controlled or took effect, or when the assignment became perfected under local law.

The entire presentation of the petitioning creditors was the introduction into evidence of assignment of the monies due and to become due pursuant to the contract between the Appellant and the United States Air Force and the date of notice to the contracting officer. The sole theory of these creditors was that, because of the statutory provisions of 41 U.S.C.A. 15, the assignment was void, or was otherwise "unperfected", under the Bankruptcy Act until notice was given to the contracting officer. (Record pages 24-28)

The theory of the Appellant, in the trial court, as expressed in its Memorandum of Points and Authorities, was that once the assignment was made to the Bank of Tokyo in California it became so far perfected that no creditor of Appellant could have acquired any rights superior to the rights of the assignee because the notice and filing require-

ments of 41 U.S.C.A. 15 are for the benefit of the United States. (Record pages 64-68)

The Referee's decision and opinion, which was adopted in full by the District Court, was based solely on the effect of 41 U.S.C.A. 15 on the assignment until notice was given thereunder to the contracting officer. The Referee's opinion states, "But such assignment is in limbo until the statutory requirement of notice to the contracting officer is given." No mention whatsoever is made of State or local law. (Record pages 77-83)

It is, therefore, apparent that the entire consideration of this matter in the Court below was based on an erroneous theory, i.e., that the Federal Statute, 41 U.S.C.A. 15, without regard to State or local law, controlled the question of "perfection" of the assignment for purposes of the four-month period in Section 3 of the Bankruptcy Act. This Court has held just the reverse.

No consideration having been given to this point in the trial court, Appellant respectfully submits that it is inappropriate for this Court to attempt to arrive at a correct decision on the question of "perfection" of the assignment under local law, the record being grossly incomplete on this point.

This Court has decided that, if Japanese law is applicable, the judgment must be affirmed as no notice or consent has been shown in the record as is required under that law. However, the omission of any consideration of whether this is the applicable local law, what its effect is and whether it has been complied with within four months of the filing or not has left the matter open. A hearing on this question would give Appellant the opportunity to show that, in addition to the "consent" to assignment contained in the contract itself, there was oral notice and consent by the contracting officer to the assignment prior to the actual assignment.

The Court has stated that it is entitled to treat the statement in Appellants' initial Brief that the assignment was executed and entered into in Japan as an admission of the Appellant. However, Appellant would point out to the Court that the Appellee took issue with this assertion in his Brief on page 3, and the Appellant, in effect, withdrew this assertion and agreed with Appellee in the Appellant's Reply Brief, page 6, that the record is silent as to where the assignment took place or what local law governed the perfection of the assignment as to third party creditors. The statement of Appellant's Brief that the assignment was *delivered* in Tokyo, Japan, was the result of a misconception on the part of the Appellant's counsel that Mr. J. Asano was an agent of the Bank of Tokyo of California, rather than simply a representative of the Japanese creditors included in the assignment.

The assignment does show that it, or at least copies thereof, came into the possession of the Bank of Tokyo of California at San Francisco, California, on or before July 25, 1961, the date the notice was sent by that Bank from that place to the contracting officer. There is obviously some connection with the State of California, and, as pointed out by the Court in its Opinion, under the present state of the record, it is not certain that it was not actually delivered in California, under the current state of the record.

The record does not show whether or not notice of the assignment or of intention to make the assignment was filed in accordance with Sections 3017, 3018 and 3019.

Under the case of *Costello* v. *Bank of America National Trust & Savings Association* (9th Cir.) 246 F. 2d 807, the above-mentioned statutes are inapplicable to a written contract of this kind, and the general California rule still governs on the question of perfection of the assignment as to third party creditors. It has long been the law in Cali-

fornia that a non-notifying assignee was entitled to priority over *creditors* of the assignor. There has been no presentation of evidence of whether or not the alleged bankrupt and the United States both treated the account as an open book account.

Therefore, Appellant respectfully submits to the Court that, in the light of the Court's ruling that local law controls the question of perfection of the assignment, rather than the Federal Statute, 41 U.S.C.A. 15, the case is one which properly should be remanded to the trial court for a full development of the facts regarding the applicability and effect of the local law upon the perfection of the assignment, and that this Court should grant a rehearing on this matter in order that full briefs and argument can be presented on this point.

Respectfully submitted,

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I hereby certify that in my judgment the above Petition for Rehearing is well founded and is not interposed for delay.

.....
R. F. Wheless, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit, I have served upon counsel for the Respondents as named below, three (3) copies each of this Petition for Rehearing by placing the same in the United States Mails with proper postage thereon and addressed as set forth below, on this ..... day of April, 1966.

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